Speed Modulation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–289–08 OF 2021
NOORIN BADARUDDIN J
14 JULY 2022

Civil Procedure — Judicial review — Application for leave — Application for leave to apply for order of certiorari to quash decision of Director General of Inland Revenue — Director General of Inland Revenue issued notice of assessment and notice of additional assessment of real property gains tax — Whether applicant adversely affected by decision — Whether application was frivolous — Whether questions raised were questions of law — Whether judicial review was the appropriate forum — Whether there were exceptional circumstances — Whether leave of judicial review ought to be granted — Whether court should grant stay of further proceedings in respect of decision of Director General of Inland Revenue

This was an application by the applicant for leave to apply for, inter alia, an order of certiorari to quash the decision ('the decision') of the Director General of Inland Revenue ('the respondent') in the form of notice of assessment for real property gains tax ('RPGT') for the year of assessment ('YA') 2021 dated 22 July 2021 and the notice of additional assessment for RPGT for YA 2021 dated 22 July 2021 ('RPGT assessments'). The RPGT assessments were in relation to the sale of land by the applicant whereby the applicant valuer known as Jones Lang Wootton ('JLW') had valued the land at RM102m. The applicant and the purchaser had filed their RPGT return forms based on the said amount and the total RPGT payable based on the RPGT return forms amounted to RM4,234,566. Subsequently, the respondent had demanded RPGT of RM13,979,045.90 from the applicant for the disposal of the said land after considering the valuation of the market value of the land by 'Jabatan Penilaian dan Perkhidmatan Harta' ('JPPH'). Aggrieved by the decision, the applicant had filed the present application for leave to apply for judicial review against the said decision. The applicant contended that: (a) the decision arose from a clear lack of jurisdiction and error of law; (b) the decision was made by the respondent in serious breach of natural justice by breaching its duty to give reasons; and (c) the decision was made in serious breach of natural justice whereby the respondent had failed to afford the applicant with the right to be heard at any time before the decision was made. The respondent submitted that the applicant was not in any way affected by the decision and that the decision was not amenable to judicial review.

Held, granting order in terms of the application for leave and stay of further

proceedings until the final determination of the judicial review application:

(1) It could not be disputed that the applicant having been made to pay the RPGT triple times of the tax payable was 'adversely affected' by the respondent's decision and as such the applicant had the necessary locus standi to file this application (see para 15).

(2) The principles laid down by the apex courts on the low threshold for leave had equal force to disputes relating to the RPGT assessments issued under the Real Property Gains Tax Act 1976 ('the RPGTA') where the courts had also granted judicial review notwithstanding the availability of an appeal to the Special Commissioner of Income Tax ('the SCIT'). In fact, the RPGTA itself recognised judicial review against tax assessments made by the respondent and s 15(3) of the RPGTA did not oust judicial review. At this low threshold leave stage, the sole question to be asked was whether the application was frivolous (see paras 13 & 22).

(3) The instant matter involved allegations of error of law and that the decision arose from a clear lack of jurisdiction and made in absence of procedural fairness, in breach of natural justice and in breach of the applicant's legitimate expectations. The applicant had also contended that the respondent had also failed to consider relevant considerations. Accordingly, there were no facts in dispute at this stage. The only questions at hand were questions of law which the court found were suitable for determination by the court by way of judicial review (see para 23).

(4) The court found that there were exceptional circumstances as the respondent had not provide any proper reasons to substantiate the substituted market value of the subject land. Further, the respondent had not specified the appropriate provisions of the RPGTA under which he was exercising his powers. Since the respondent derived his jurisdiction from the RPGTA, the boundaries of his powers to determine the market value of an asset and whether he had exceeded the boundaries were questions of law suitable to be determined by the court (see paras 24–25 & 34).

(5) The court found that the applicant's complaints raised the following questions of law: (a) whether the respondent's failure to stipulate the specific provisions of the law under which he was acting and to furnish the valuation report relied upon by the respondent tantamount to a breach of natural justice; (b) whether the respondent had breached the principles of natural justice by refusing to give reasons for the decisions; and (c) whether the respondent's decision had also been made in breach of the applicant's legitimate expectations that it would be given reasons for the decision and/or the prior opportunity to be heard. Based on the above findings, judicial review would be more appropriate forum as the

applicant's complaints raised questions of law. Further, the court was of the view that this was a proper case for leave to be granted in order for the basis of the decision to be properly considered at the substantive stage (see paras 35–37 & 50–51).

(6) Considering the special circumstances as discussed above, the court was persuaded to grant stay of all further proceedings in respect of the decision. The applicant's status quo had to be preserved as the implementation of the respondent's decision would result in significant tax liabilities which would adversely and unfairly affect the applicant. The stay order would not deny the applicant the full benefit of a successful challenge more so when the challenge against the decision was premised upon error of law and a serious breach of the principles of natural justice. The balance of convenience tilted in favour of the applicant and if a stay was not granted, the applicant would suffer damage and injury which could not be remedied by the refund of huge taxes. On the other hand, the respondent could not be gainsaid to be affected by the stay order because if the judicial review application was subsequently disallowed at the substantive stage, the respondent was able to collect the taxes imposed on the applicant (see paras 52–53).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pemohon untuk kebenaran memohon, antara lain, perintah certiorari untuk membatalkan keputusan ('keputusan tersebut') Ketua Pengarah Hasil Dalam Negeri ('responden') dalam bentuk notis taksiran bagi cukai keuntungan harta tanah ('CKHT') bagi tahun taksiran ('TT') 2021 bertarikh 22 Julai 2021 dan notis taksiran tambahan untuk CKHT bagi TT 2021 bertarikh 22 Julai 2021 ('taksiran CKHT tersebut'). Taksiran CKHT tersebut adalah berkaitan dengan penjualan tanah oleh pemohon di mana penilai pemohon yang dikenali sebagai Jones Lang Wootton ('JLW') telah menilai tanah tersebut pada harga RM102 juta. Pemohon dan pembeli telah memfailkan borang nyata CKHT berdasarkan jumlah tersebut dan jumlah CKHT yang perlu dibayar berdasarkan borang nyata CKHT adalah berjumlah RM4,234,566. Setelah itu, responden telah menuntut CKHT sebanyak RM13,979,045.90 daripada pemohon untuk pelupusan tanah tersebut selepas mempertimbangkan penilaian nilai pasaran tanah oleh 'Jabatan Penilaian dan Perkhidmatan Harta' ('JPPH'). Terkilan dengan keputusan tersebut, pemohon telah memfailkan permohonan semasa untuk kebenaran memohon semakan kehakiman terhadap keputusan tersebut. Pemohon berhujah bahawa: (a) keputusan tersebut timbul daripada kekurangan bidang kuasa dan kesilapan undang-undang yang jelas; (b) keputusan tersebut dibuat oleh responden dengan pelanggaran serius terhadap keadilan semula jadi dengan melanggar kewajipannya untuk memberi alasan; dan (c) keputusan tersebut dibuat dengan pelanggaran serius terhadap keadilan semula jadi di mana responden telah gagal untuk memberikan hak kepada pemohon untuk

didengar pada bila-bila masa sebelum keputusan tersebut dibuat. Responden berhujah bahawa pemohon tidak terjejas dalam apa-apa cara sekalipun dengan keputusan tersebut dan keputusan tersebut tidak boleh diubah melalui semakan kehakiman.

Diputuskan, membenarkan perintah seperti yang dipohon dalam permohonan kebenaran dan penangguhan prosiding lanjut sehingga penentuan muktamad permohonan semakan kehakiman:

(1) Tidak boleh dipertikaikan bahawa pemohon yang terpaksa membayar CKHT yang berjumlah tiga kali ganda daripada cukai yang sepatutnya perlu dibayar telah 'adversely affected' oleh keputusan responden dan oleh itu pemohon mempunyai locus standi yang diperlukan untuk memfailkan permohonan ini (lihat perenggan 15).

(2) Prinsip-prinsip yang ditetapkan oleh Mahkamah Tertinggi mengenai ambang rendah untuk permohonan kebenaran mempunyai kekuatan yang sama terhadap pertikaian berkaitan taksiran CKHT yang dikeluarkan di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('ACKHT') di mana mahkamah juga telah membenarkan semakan kehakiman walaupun rayuan boleh dibuat kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP). Malah, CKHTA sendiri mengiktiraf semakan kehakiman terhadap taksiran cukai yang dibuat oleh responden dan s 15(3) CKHTA tidak mengecualikan semakan kehakiman. Pada peringkat kebenaran ambang rendah ini, satu-satunya soalan yang perlu ditanya ialah sama ada permohonan tersebut adalah remeh (lihat perenggan 13 & 22).

(3) Kes semasa melibatkan dakwaan kekhilafan undang-undang dan keputusan tersebut timbul daripada kekurangan bidang kuasa yang jelas dan dibuat tanpa adanya keadilan prosedur, melanggar keadilan semula jadi dan melanggar jangkaan sah pemohon. Pemohon juga berhujah bahawa responden juga gagal mempertimbangkan pertimbangan yang berkaitan. Sehubungan itu, tiada fakta yang dipertikaikan pada peringkat ini. Persoalan-persoalan yang timbul ialah persoalan-persoalan undang-undang yang didapati oleh mahkamah sesuai untuk penentuan oleh mahkamah melalui semakan kehakiman (lihat perenggan 23).

(4) Mahkamah mendapati terdapat keadaan luar biasa kerana responden tidak memberikan apa-apa alasan yang wajar untuk menyokong nilai pasaran gantian tanah tersebut. Selanjutnya, responden tidak menyatakan peruntukan mana di dalam CKHTA yang digunakan dalam menjalankan kuasanya. Memandangkan responden memperoleh bidang kuasanya daripada CKHTA, sempadan kuasanya untuk menentukan nilai pasaran sesuatu aset dan sama ada dia telah melebihi sempadan tersebut adalah persoalan undang-undang yang sesuai untuk ditentukan oleh mahkamah (lihat perenggan 24–25 & 34).

(5) Mahkamah mendapati bahawa aduan pemohon telah membangkitkan persoalan undang-undang berikut: (a) sama ada kegagalan responden untuk menyatakan peruntukan undang-undang yang khusus yang digunakan dan kegagalan untuk memberikan laporan penilaian yang dirujuk oleh responden terjumlah kepada pelanggaran keadilan semula jadi; (b) sama ada responden telah melanggar prinsip keadilan semula jadi dengan enggan memberikan alasan bagi keputusan tersebut; dan (c) sama ada keputusan responden juga telah dibuat dengan melanggar jangkaan sah pemohon bahawa ia akan diberi alasan untuk keputusan dan/atau peluang terdahulu untuk didengar. Berdasarkan dapatan-dapatan di atas, semakan kehakiman akan menjadi forum yang lebih sesuai kerana aduan pemohon menimbulkan persoalan-persoalan undang-undang. Selanjutnya, mahkamah berpendapat bahawa ini adalah kes yang sesuai untuk kebenaran diberikan agar asas keputusan tersebut dipertimbangkan dengan sewajarnya pada peringkat substantif (lihat perenggan 35–37 & 50–51).

(6) Berdasarkan keadaan luar biasa seperti yang dibincangkan di atas, mahkamah telah memutuskan untuk membenarkan penangguhan semua prosiding selanjutnya berkenaan dengan keputusan tersebut. Status quo pemohon perlu dikekalkan kerana pelaksanaan keputusan responden akan mengakibatkan liabiliti cukai yang ketara yang akan memberi kesan buruk dan tidak adil kepada pemohon. Perintah penangguhan tersebut tidak akan menafikan pemohon daripada mendapat faedah penuh daripada cabaran yang berjaya lebih-lebih lagi apabila cabaran terhadap keputusan tersebut berdasarkan kekhilafan undang-undang dan pelanggaran serius terhadap prinsip keadilan semula jadi. Imbangan kemudahan memihak kepada pemohon dan jika penangguhan tidak diberikan, pemohon akan mengalami kerugian dan kecederaan yang tidak dapat diperbaiki dengan pembayaran balik cukai yang banyak. Sebaliknya, responden tidak boleh dikatakan terjejas oleh perintah penangguhan kerana jika permohonan semakan kehakiman kemudiannya tidak dibenarkan pada peringkat substantif, responden boleh mengutip cukai yang dikenakan ke atas pemohon (lihat perenggan 52–53).]

Cases referred to

Bintulu Lumber Development Sdn Bhd v Director General of Inland Respondent (Civil Application No 01(f)-28–10 of 2019 (Q))(unreported) (distd)

Chye Hup Heng Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2017] MLJU 921; [2017] 1 LNS 904, HC (refd)

Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd [2021] MLJU 1340; [2021] 9 CLJ 896, HC (refd)

Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2021] MLJU 1229, HC (refd)

Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2018] MLJU 590; [2018] 7 CLJ 487, HC (refd)
Garrett v Nicholson (1999) 21 WAR 226; [1999] WASCA 32, SC (refd)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)
Government of Malaysia v Jasanusa Sdn Bhd [1994] MLJU 370; [1995] 2 CLJ 701, SC (folld)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Ketua Pengarah Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd & Anor [2017] 1 MLJ 563, FC (distd)
Ketua Pengarah Hasil Dalam Negeri v Latex Manufacturing Sdn Bhd [2017] 7 MLJ 379, HC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750; [2021] 2 CLJ 579, FC (refd)
Parkwood Palms Sdn Bhd v Pemungut Duti Setem [2021] MLJU 1332; [2021] 1 LNS 1189, HC (refd)
Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1; [2021] 2 CLJ 808, CA (refd)
Port Dickson Power Bhd v Ketua Pengarah Hasil Dalam Negeri [2012] MSTC 30-045, HC (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)
Re ex parte application for leave to apply for judicial review by Shell People Services Asia Sdn Bhd [2019] MLJU 1898, HC (refd)
Shell People Services Asia Sdn Bhd v KPHDN (Court of Appeal) Appeal No B-01 (A)-474–09 of 2019 (unreported), CA (refd)
Uniqlo (Malaysia) Sdn Bhd v Ketua Pengarah Kastam dan Eksais [2021] 2 MLJ 120, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Evidence Act 1950 ss 41, 42, 43, 44, 45
Income Tax Act 1976 s 140(1)
Real Property Gains Tax Act 1976 ss 15, 15(3), 18, 25(2), Schedule 2, paras 9, 11, 11(2), (2)(c), 23(1), (5)

Nitin Nadkani (with Jason Tan Jia Xin and Chris Toh Pei Roo) (Lee Hishammuddin Allen & Gledhill) for the applicant.
Ahmad Faiz Razali (with Mohd Izhanudin bin Alias) (Federal Counsel, Attorney General Chambers) for the respondent.

Noorin Badaruddin J:

[1] This is an application for leave to apply for, among others, an order of certiorari to quash the respondent's decision in the form of the notice of assessment and notices of additional assessment for real property gains tax ('RPGT') for the year of assessment ('YA') 2021 dated 22 July 2021 and the notice of additional assessment for RPGT for YA 2021 dated 22 July 2021 ('RPGT assessments') ('decision').

BACKGROUND FACTS

[2] The applicant sold four pieces of land ('subject land') to Pilihan Teraju Sdn Bhd ('purchaser') for RM102m via a sale and purchase agreement ('SPA') dated 12 January 2021.

[3] The purchaser and the applicant are both owned by the same holding company, IOI Properties Bhd and under the Real Property Gains Tax Act 1976 ('the RPGTA') the applicant and the purchaser are 'connected persons'. Since the transaction was made under the RPGTA and that it was a transaction with connected person and not one made at arm's length, the SPA is deemed to be a transaction for a consideration equal to the market value of the subject land.

[4] Accordingly, the applicant had obtained an independent valuation report for the subject land from a firm of registered valuers, Jones Lang Wootton ('JLW'). On 30 June 2020 JLW issued its valuation report which valued the subject land at RM102m to which the applicant duly adopted as the disposal price.

[5] Both the applicant and the purchaser filed in their respective RPGT return forms stating RM102m as the consideration value. The total RPGT payable based on the RPGT return forms amounted to RM4,234,566.

[6] On 28 April 2021, the revenue department (the 'revenue') requested documents from the applicant. On 6 May 2021 the applicant duly complied.

[7] Via email of 23 July 2021, the revenue demanded RPGT of RM13,979,045.90, almost a 100% higher than the valuation by JLW from the disposal of the subject land in the form of the RPGT assessments. The revenue had relied on the 'Jabatan Penilaian dan Perkhidmatan Harta' ('JPPH') valuation for the market value.

[8] As requested, the applicant has submitted a copy of the valuation report by JLW to the revenue. However, at any time before the decision was made or at the time the decision was conveyed to the applicant, the revenue did not

provide a copy of the JPPH's valuation report to the applicant or any confirmation from the JPPH. No material information was provided on the JPPH's valuation and the applicant was not made privy to any communications between the revenue and the JPPH on the matter.

[9] In their letter dated 22 July 2021 and email dated 23 July 2021 to the applicant, the revenue referred to the following provisions:

(a) s 15 of the RPGTA (power to issue RPGT Assessment);

(b) paras 23(1) and 23(5), Schedule 2 of the RPGTA (connected persons); and

(c) para 9, Schedule 2 of the RPGTA (transactions deemed to be at market value).

[10] Aggrieved with the decision, the applicant commenced the present application.

SUMMARY OF THE APPLICANT'S CONTENTIONS

[11] Summarily it is the applicant's contention that:

(a) the decision arises from a clear lack of jurisdiction and error of law;

(b) the decision was made by the respondent in serious breach of natural justice by breaching its duty to give reasons; and

(c) the decision was made in serious breach of natural justice whereby the respondent has failed to afford the applicant with the right to be heard at any time before the decision was made.

SUMMARY OF THE ATTORNEY GENERAL'S CONTENTIONS

[12] Summarily, the attorney general takes the position that:

(a) the respondent's decision is lacking in finality as the RPGT assessment that was served on the applicant ceased to have legal effect as it cannot be enforced until the determination by the Special Commissioner of Income Tax ('SCIT');

(b) there is in existence the local remedy under s 18 of the RPGTA which provides an avenue for aggrieved person to appeal against the decision made by the respondent to the SCIT;

(c) there are no special circumstances warranting judicial review as the respondent is empowered under the anti-avoidance provision ie s 25(2) of the RPGTA to disregard or vary the transaction and make such adjustments as he considers just and proper. Even without holding the

correctness of the valuation prepared by the JPPH, the respondent is authorised to determine the market value of the real property disposal and that even if the respondent has wrongly exercised its power under para 11, Schedule 2 of the RPGTA, this only amounts to illegality;

(d) there is no serious breach of the principles of natural justice as the applicant had been given the right to be heard; and

(e) the applicant is not in any way adversely affected by the decision as the decision is not final nor amenable to judicial review as well as against the weight of jurisprudence, both trite and recent in administrative and tax law.

FINDINGS

[13] The Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532 had made it clear that at this low threshold leave stage the sole question to be asked is whether or not the application is frivolous. Gopal Sri Ram JCA (as he then was) speaking on behalf of the court in addressing the argument of the alternative remedy had held as follows:

> THE ALTERNATIVE REMEDY ARGUMENT
>
> [3] *The very first point that we would make is that arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage. The sole question at the leave stage is whether the application is frivolous.* As Raja Azlan Shah LP observed in *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68; [1983] CLJ 271 Rep; [1983] 1 CLJ 130:
>
> > We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that *the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari.*
>
> [4] And as Abdoolcader SCJ said in *JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134; [1986] 2 CLJ 409; [1986] CLJ Rep 160:
>
> > At the outset of the hearing of the appeal before us we were of the view ex facie that leave should in fact have been granted in the court below as the point taken by the appellant was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari.
>
> [5] In *Tang Kwor Ham v Pengurusan Danaharta Nasional Bhd* [2006] 1 CLJ 927, this court in its majority judgment sought to collect and discuss the several authorities on the subject and concluded as follows:
>
> > To paraphrase in less elegant language what has been said in these cases, *the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or*

> *the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine.* So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament (see art 63 of the Federal Constitution).

That is a view to which we adhere.

[6] In the light of the settled approach to be taken at the leave stage, we are of the respectful view that *the learned judge erred in dealing with the alternative remedy argument at the leave stage. She should have curbed the enthusiasm of counsel for the respondents by informing them that the alternative remedy point is one that she was not prepared to deal with in limine but that it would have to be properly taken and dealt with at the hearing of the substantive motion.*

[7] The second point we would make is this. *The existence of an alternative remedy does not automatically and without more oust the court's judicial review jurisdiction. The proper approach is for the judicial review court to take into account the availability of the alternative remedy in deciding whether to exercise its discretion to grant relief on the substantive application.* Thus, in *Harbanslal Sahnia v Indian Oil Corporation Ltd* AIR [2003] SC 2120, RC Lahoti J (later CJ) said:

> So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, *suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion.* In an appropriate case, *in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged.* (See *Whirlpool Corporation v Registrar of Trade Marks, Mumbai and Others* [1998] 8 SCC 11).

[8] In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] 1 CLJ 451; [1987] CLJ Rep 110, Hashim Yeop A Sani SCJ said:

> In answer to the first question, we would therefore hold that *the discretion is still with the courts, but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty, or in appropriate cases, a serious breach of the principles of natural justice.*

[9] In *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113; [1983] CLJ Rep 216 ; [1983] 1 CLJ 282, Wan Suleiman FCJ said:

> An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy — see *R v Postmaster General Ex p Carmichael* [1928] 1 KB 291.
>
> Nor need he have, before he can apply for that remedy, exhausted his right of appeal to a court of law. Thus, in *The King v Wandsworth Justices* [1942] 1 KB

281 two summonses were preferred before Wandsworth Justices by the inspector of weights and measures for the county of London against the applicant, Henry Read, a butcher, charging him with having misrepresented by means of tickets the weight of certain meat which he offered for sale. At the hearing of the summonses the tickets were not produced, and, the applicant's counsel having objected to their absence, the solicitor representing the inspector agreed that the question whether or not the absence of the tickets had been satisfactorily accounted for should be treated as a preliminary issue in the proceedings to be decided before determination of the summonses on their merits. The justices, having heard evidence and arguments, withdrew to consider the matter. On their return after a considerable time, the chairman announced that the applicant was acquitted on one summons and convicted on the other and a fine of 10s. was imposed. The applicant obtained leave to make this application for an order of certiorari to remove the conviction into the court that it might be quashed.

[10] *In the light of these weighty authorities, it is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A fortiori, it is a matter which does not fall to be considered on a leave application.* (Emphasis added.)

[14] On behalf of the Attorney General ('AGC'), the learned federal counsel submits that the applicant is not in any way affected by the decision of the respondent and that the decision is not amenable to judicial review and against the weight of jurisprudence, both trite and recent in administrative and tax law. It is of the considered view that this submission is clearly misplaced. It can be understood that the stand taken by the AGC is based on the argument that the present matter ought to have been referred to the SCIT first before the decision can be said to be final.

[15] Firstly, it cannot be disputed that the applicant having been made to pay the RPGT triple times of the tax payable is 'adversely affected' by the respondent's decision and as such the applicant has the necessary locus standi to file this application.

[16] The decision of the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 is a clear authority that the taxpayer is entitled to resort to the remedy of judicial review in exceptional circumstances ie when there is a clear lack of jurisdiction or a blatant failure to perform some statutory duty or where there is a serious breach of the principles of natural justice. In that case, it is important to note that the principles of having to make a maximal evaluation of whether there is a clear lack of jurisdiction, a blatant failure to perform some statutory duty or a breach of the rules of natural justice on the part of the respondent are to be considered at the merit stage of proceedings and not at the leave stage. It would be wrong for the High Court to undertake a maximal assessment of the case at the leave stage of proceedings and the considerations in *Jagdis Singh* are only for the merits stage of

proceedings. In the case of *Re ex parte application for leave to apply for judicial review by Shell People Services Asia Sdn Bhd* [2019] MLJU 1898 the High Court applied *Jagdis Singh* in undertaking a maximal evaluation of the taxpayer's case at the leave stage. The decision of the High Court was recently overturned by the Court of Appeal in *Shell People Services Asia Sdn Bhd v KPHDN* (Court of Appeal) Appeal No B-01 (A)-474–09 of 2019 (unreported) and the taxpayer was given leave to apply for judicial review.

[17] Heavy reliance is made by the Attorney General on the case of *Bintulu Lumber Development Sdn Bhd v Director General of Inland Respondent* (Civil Application No 01(f)-28–10 of 2019 (Q))(unreported) ('Bintulu Lumber') and *Ketua Pengarah Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd & Anor* [2017] 1 MLJ 563 ('Alcatel-Lucent'). Both cases can be distinguished herein.

[18] In *Bintulu Lumber*, it is clear from the High Court's judgment that *Bintulu Lumber* as the taxpayer therein had attempted to bring judicial review proceedings before the High Court on question of law that was decided against it by the Court of Appeal in a previous year. In other words contrary to the principle of res judicata, *Bintulu Lumber* was attempting to have a second bite of the cherry and it is a clear case of abuse of the court process. In that case, the exact same issue of reinvestment allowances ('RAs') had previously arisen for *Bintulu Lumber* for year of assessment 2008. However, in 2008, *Bintulu Lumber* did not pursue judicial review and took its dispute solely by way of appeal to the SCIT. The case was litigated up to the Court of Appeal wherein the Court of Appeal found against *Bintulu Lumber.* Having lost on the issue of the RAs for year of assessment 2008, *Bintulu Lumber* tried once again to dispute the same RA issue when it arose again for a later year of assessment 2011 by way of judicial review. It is clear that the High Court rejected the application for leave to apply for judicial review as there was nothing exceptional since the very same issue had already been decided before against *Bintulu Lumber*, by the Court of Appeal.

[19] In the case of *Alcatel-Lucent* the taxpayer was in fact granted leave to apply for judicial review and succeeded on the merits before the High Court and Court of Appeal but it lost on the merits before the Federal Court. The Federal Court in fact undertook an assessment of the merits of the taxpayer's judicial review application and found against the taxpayer on the merits and on the basis the taxpayer was out of time. It is clear that the existence of a domestic remedy did not form part of the ratio of the Federal Court in that case. The Federal Court did not lay down a blanket ruling against judicial review. In fact, the Federal Court explicitly stated that judicial review was open to the taxpayer. The Federal Court stated:

> [95] The matter before us should be focused on whether any defect is detectable in the decision making process ie before the appellant arrives at its decision, and

whether the decision falls within the *R Rama Chandran* approach. Having perused the evidence adduced before us, we are satisfied that apart from there being no flaw detectable in the decision making process there was also no illegality or irrationality in the decision. That being so the appellant's decision must stand. The respondents therefore are liable to the withholding tax.

[96] *We have an additional reason why the appeal must be allowed. A rather disquieting factor which we detect is that, even though the respondents are not prevented from seeking remedy under O 53 of the RHC 1980, the respondents have failed to satisfy some of the statutory requirements.* (Emphasis added.)

[20] So, what could be gleaned from the decision of the Federal Court in *Bintulu Lumber* is that despite its decision in *Alcatel-Lucent* and the high threshold for leave to appeal to the Federal Court under s 96(a) of the Courts of Judicature Act 1964, the Federal Court gave recognition of the importance of judicial review in challenging the executive's decision including the respondent as the tax collecting agency.

[21] This is consistent with the decision of the High Court in *Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 590; [2018] 7 CLJ 487 in which Vazeer Alam Mydin Meera JC (as His Lordship then was) held as follows:

... when the pronouncement of the Federal Court in Alcatel-Lucent is read together with the ratio decidendi in Chin Mee Keong and QSR Brands Bhd, the availability or non-availability of an alternative remedy is irrelevant at the leave stage and should be raised at the merits stage. The existence or non-existence of a sufficient alternative remedy is something that should be canvassed at the substantive stage and is therefore a premature objection to be raised now at the leave stage. (Emphasis added.)

[22] The principles laid down by the apex courts on the low threshold for leave have equal force to disputes relating to the RPGT assessments issued under the RPGTA where the courts have also granted judicial review notwithstanding the availability of an appeal to the SCIT (see *Chye Hup Heng Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2017] MLJU 921; [2017] 1 LNS 904). In fact, the RPGTA itself unlike some statutory provisions that expressly excludes judicial review specifically recognise judicial review against tax assessments made by the respondent. Section 15(3) of the RPGTA does not oust judicial review as it provides as follows:

15 Additional assessments

(3) Where in a year of assessment —

(a) *any assessment made under this Act* or the Income Tax Act 1967 *in respect of a person for any year of assessment has been determined by the court on appeal or review;* (Emphasis added.)

[23] The instant matter involves allegations of error of law and that the decision arises from a clear lack of jurisdiction and made in absence of procedural fairness, in breach of natural justice and in breach of the applicant's legitimate expectations. It is further contended that the respondent has also failed to consider relevant considerations. Accordingly, there are no facts in dispute at this stage. The only questions at hand are questions of law which this court finds are suitable for determination by this court by way of judicial review. The Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 had stated that:

> ... judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, of inferior courts. In the words of Lord Dennin in *Pearlman v Harrow School* (ibid) at p 70, 'No court or tribunal has any jurisdiction to make an error of law on which the decision in a case depends. If it makes such an error it goes outside its jurisdiction and certiorari will lie to correct it'.

[24] Additionally, it is the finding of this court that there are exceptional circumstances in the instant matter as the respondent has not provide any or proper reasons to substantiate the substituted market value of the subject land. At this stage, the valuation by the JPPH relied upon by the respondent for its decision has not been produced.

[25] Further, the respondent has not specify the appropriate provisions under which he was exercising his powers. Apparently, there are two alternative powers under which the respondent can determine the market value of land. There is para 11, Schedule 2 of the RPGTA (definition of market value and circumstances in which the respondent can determine the market value) which specify three specific circumstances where the respondent is empowered to determine the market value. Paragraph 11, Schedule 2 of the RPGTA states:

> 11 Definition of market value
>
> (1) Subject to this paragraph, the market value of an asset, which is acquired or disposed of is the price which it would fetch if it were sold in a transaction between independent persons dealing at arm's length at the time of the acquisition or disposal.
>
> (2) If —
>
> (a) *the parties to the disposal of an asset are unable to agree on its market value; or*
>
> (b) *there is only one party to the disposal of an asset; or*
>
> (c) *the Director General is of the opinion that the market value of an asset as agreed on by the parties to its disposal is incorrect,*
>
> the market value in question shall be determined by the Director General. (Emphasise added.)

[26] The respondent has not specify under which limb of para 11, Schedule 2 he is relying on because at this juncture and in relation to the first limb of para 11, Schedule 2 RPGTA, the applicant and the purchaser have agreed on the market value based on the independent valuation report from JLW.

[27] In regards to the second limb of para 11(2), Schedule 2 of the RPGTA, it is apparent that this is not a transaction where there is only one party.

[28] Where the third limb of para 11(2), Schedule 2 of the RPGTA is concerned, it cannot be gainsaid that the respondent could not have formed the opinion that the market value as agreed is incorrect as the applicant had already adopted and applied the market value by JLW.

[29] The wording 'the Director General is of the opinion ...' in para 11(2)(c), Schedule 2 of the RPGTA bears similarities with the words 'The Director General, where he has reason to believe ...' in s 140(1) of the ITA which states:

> 140 Power to disregard certain transactions
>
> (1) *The Director General, where he has reason to believe* that any transaction has the direct or indirect effect of —
>
> (a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;
>
> (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;
>
> (c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or
>
> (d) hindering or preventing the operation of this Act in any respect, may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.

[30] The court in *Port Dickson Power Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] MSTC 30-045 has held that in invoking s 140 of the ITA, the respondent must specify the limb it is relying on, and disclose the grounds for his 'belief'. In that case Abang Iskandar bin Abang Hashim J (as His Lordship then was) stated as follows:

> 3. The thrust of the A's case has been concerned with the issue surrounding the proper, or rather the improper, invocation of the s 140 of the ITA 1967 by the R.
>
> 4. *The first of the concerns had related to the fact that the notice of additional assessment issued by the R was bad because it had not specified or particularized which of the limbs*

under that subsection the R had resorted to.

5. *The second one has been that the R had not shown his ground for believing that was necessary, according to the learned counsel for the A, for the R to express and disclose.*

6. *In fact, the first and the second grounds are quite well connected. To my mind, the ability of the R to ascertain his grounds for entertaining the necessary belief would greatly assist him in identifying under which particular paragraph under s 140(1) of the ITA that the A had committed the impugned act of understating his assessments for the years 2004–2005.* (Emphasis added.)

[31] Similarly, the respondent in the instant matter has failed to specify which limb under para 11, Schedule 2 of the RPGTA that he is relying on, and if it is para 11(2)(c), he has failed to disclose the reasons for his opinion that the market value is incorrect.

[32] There is also the anti-avoidance provision in s 25(2) of the RPGTA which provides:

25 Anti-avoidance provisions

(2) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of —

(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;

(b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;

(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or

(d) hindering or preventing the operation of this Act in any respect, may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such assessments as he considers just and proper in the circumstances.

[33] Unlike the more mechanical assessment provisions, both para 11, Schedule 2 and s 25(2) of the RPGTA involve discretionary powers, the exercise of which the respondent bears the onus of justifying. In other words, if the respondent were to rely on any of its powers to ignore the contract price and substitute a price of its own which in this case triples the tax payable then, at the time of the decision the respondent ought to have stipulate the specific provisions under which he is acting and the valuation report by the JPPH that the respondent was relying on ought to have been furnished.

[34] It is of the considered view that since the respondent derives his jurisdiction from the RPGTA, the boundaries of his power to determine the market value of an asset and whether he has exceeded the boundaries are

questions of law suitable to be determined by the court. In *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, the Federal Court through the judgment of Zainun Ali FJ (as she then was) had held:

> [124] Thus, it is clear to us that the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts. If an exercise of power under a statute exceeds the four corners of that statute, it would be ultra vires and a court of law must be able to hold it as such (see the Singapore Court of Appeal decision in *Chng Suan Tze v Minister of Home Affairs & Ors and other appeals* [1988] 1 SLR 132 at para [86]).

[35] The next question of law will be whether the respondent's failure to stipulate the specific provisions of the law under which it is acting and to furnish the valuation report it is relying on tantamount to a breach of natural justice. As it is the applicant does not know the legal and factual basis for the contract price ignored by the respondent resulting in the tripling of the anticipated taxes for the disposal. More importantly, the applicant is not able to adequately defend itself. This court agrees with the applicant's submission that it should not have to wait five years or more until the SCIT hearing to find out under which power the respondent is exercising or whether there was even a proper valuation report carried out before the respondent to impose the different market value.

[36] It cannot be disputed that a proper valuation report which complies with the provisions of ss 41–45 of the Evidence Act 1950 with a proper rationale setting out the comparable land transactions which underpin the report is an expert report. If indeed such report has been done as it should have been by the respondent before arriving at the supposed considered decision, there is no reason for the refusal to provide it. Thus, this court is of considered view that this is a proper case for leave to be granted in order for the basis of the decision to be properly considered at the substantive stage.

[37] One other significant issue of law and still relates to the principles of natural justice is whether the respondent has breached such principle by refusing to give reasons for the decision. In the instant case the applicant is contending that there must be reason given for the decision particularly where the supposed valuation is almost 100% higher than its independent contemporaneous valuation provided by JLW.

[38] To this end this court agrees that the remedy of a SCIT appeal would merely be perfunctory if the applicant does not even know the supposed case against it. The respondent's duty to give reasons was recognised by this court in *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2021] MLJU 1229 where this court regarded it as 'trite law' that the respondent is bound by

such a duty and granted leave for the taxpayer to commence judicial review as the respondent had failed to produce its own transfer pricing report in an income tax matter. In that case, it was the applicant's case therein that the same respondent herein had breached its duty to provide reasons when he issued the impugned decision without providing any clear reasons and/or justifications as to how the applicant and a third party contractor are associated persons and as to the respondent's preferred transfer pricing methodology. This court had held as follows:

> [49] *It is apparent that not only the applicant who is left in the dark as to how the respondent came to its transfer pricing adjustments. The court for that matter is deprive from knowing the respondent's version of what the transfer pricing report ought to be. What are the factors did the respondent consider? Did it perform the most perfunctory functionary and economic analysis? What are the comparables used in the economic analysis and for that matter, did the respondent comply with its own Transfer Pricing Guidelines?*
>
> [50] *It has been said that additional assessment is rooted in fairness and that there is a duty on the part of the respondent being an important public authority to give its reasons* more so, when the issues pertaining to transfer pricing are complex matters and can never be straightforward. As the applicant has submitted and this court agrees, that *at the very least, the most basic Transfer Pricing Report by the respondent will be able to shed some light on the applicant on this issue because without some basis, how would the applicant be able to adequately defend itself before the Special Commissioners of Income Tax. The applicant's basis and justifications for the pricing of the leasing transactions is definitely in stark contrast to the respondent's failure to provide its own Transfer Pricing Report to the applicant.* (Emphasis added.)

[39] Similarly, the applicant in the instant matter is left in the dark as to the basis for the respondent's decision and its version of what the valuation of the subject land ought to be. What is the reason for the huge discrepancy with the independent valuation? What factors did the respondent or the JPPH consider? Had the respondent or the JPPH even valued the correct pieces of land? Without these details, how would the applicant be able to adequately defend itself before the SCIT?

[40] The Court of Appeal has recently affirmed and restated the law on the duty of public authorities to give reasons in *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1; [2021] 2 CLJ 808. In applying the Court of Appeal's dicta in that case to the present matter, 'a reasoned decision can be an additional constituent of the concept of fairness' and 'reasons have to be given so that the right of appeal may be properly and meaningfully exercised'.

[41] Again, as stated by the Court of Appeal in *Perbadanan Pengurusan Trellises & Ors*, 'the absence of an express provision in any statute requiring the decision-maker to give reasons does not mean that the duty does not exist

unless and until the statute specifically states so' and 'the absence of such a provision ought not to be regarded as a cloak under which the decision-maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large'. It is of the considered view that there is the duty to give reasons and it apply in the circumstances of this case notwithstanding the absence of an express provision in the RPGTA requiring the respondent to do so as the RPGTA does not specifically state that the duty to give reasons does not apply to the respondent.

[42] To add further, in the recent decision in the case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579, the Federal Court had stated that the principles of natural justice include the duty to give reasons and right to be heard, and that this has now 'evolved into a norm', even where there is no statutory requirement to do so. The Federal Court confirmed as follows:

> ... What had started off as an exception to the instances when reasons ought to have been given even though there is no statutory requirement to give reasons, has evolved into a norm — that the rules of natural justice require reasons to be provided.

[43] In tax cases, the duty has previously been applied by the Court of Appeal in *Uniqlo (Malaysia) Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [2021] 2 MLJ 120 (approved by the Federal Court in Civil Appeal No 08(f)-477–12 of 2019(W)) where the Court of Appeal held that:

> From the most recent pronouncement of the Federal Court in the Kesatuan *Pekerja-Pekerja* case abovementioned and the House of Lords case of *Doody v Secretary of State for the Home Department and other appeals* [1993] 3 All ER 92, as well as other authorities referred to by the Federal Court in Kesatuan *Pekerja-Pekerja* the legal position in respect of the duty to give reasons as applied to the facts of the instant case can be summarised as follows. *One, the absence of specific provisions in the GST Act which requires the Director General to give reasons for its decision cannot be interpreted to mean that no reasons need be given. Two, if no reasons need to be given by the Director General, the GST Act must expressly state so. In the instant case, there is no such express provision in the GST Act which exempts the Director General from having to give reasons for its decision. Three, a duty by the Director General to give reasons for its decision may be implied in the particular circumstances, as the decision is not straight forward but is dependent on many factors which include compliance with the legal requirements under the GST Act, as well as an audit certification of physical stock in hand by an approved auditor. In addition, the crucial need for the submission of accurate data by the applicant of the special refund as mandated by s 191(3) of the GST Act places an onerous burden on the applicant to comply with the requirements of the GST Act and by necessary implication, a corresponding duty on the Director General to give reasons for its decision to reject the applicant's refund application.*
>
> In addition, *as a public decision-making body, the Director General of Customs and Excise, (the respondent) has a duty to give reasons for its decision. As stated by the Federal*

Court in the Kesatuan Pekerja-Pekerja case, a reasoned decision can be an additional constituent of the concept of fairness (*Rohana bt Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 and *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193*). The giving of reasons is also one of the fundamentals of good administration, as it inculcates transparency and accountability in public decision-making bodies like the Director General of Customs and Excise.* (Emphasis added.)

[44] In *Garrett v Nicholson* (1999) 21 WAR 226; [1999] WASCA 32 the full court of the Supreme Court of Western Australia had held that the reasoning process must be disclose to ensure that the applicant's right of appeal is secured. The court stated:

[73] *At common law there was (and is) a duty on a decision maker required to act judicially or quasi-judicially to give reasons for decision. The reasons must disclose adequately the intellectual process which has resulted in a particular determination.* I will repeat what I said on the general question of a duty to give reasons (with which White J agreed) in *Frichot v Zalmstra*, unreported; FCt SCt of WA; Library No 981291; 13 May 1998 at 14:

> The authority most often cited in this regard is the dicta of Moffitt P, in *Pettit v Dunkley* [1971] 1 NSWLR 376 at 387–388. That passage is so well-known that I will not repeat it other than to say that it has been adopted in this court in cases such as *Lloyd v Faraone* [1989] WAR 154 at p 163. In *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at p 702 *the Court indicated that in a position such as we have here the appealable error lies not in the result of the trial but in the failure to give relevant reasons in circumstances which deprive a party of an effective right of appeal conferred by statute.* To that I would add that *in our judicial system, where proceedings are to be conducted in public, the duty to give reasons is an adjunct to or in some respects a part of the overall obligation to afford to litigants procedural fairness. Put in that way, in addition to securing the statutory right of appeal, the obligation to give adequate reasons is part of the fairness to a litigant who comes to the court to know why it is that he or she succeeded or has been unsuccessful …* [T]hat does not mean that every piece of evidence, every exhibit, every word that has fallen from counsel during submissions must be alluded to expressly or even by implication in the course of giving reasons. It would neither be necessary nor feasible for an obligation of that nature to be imposed on trial courts.
>
> *It is sufficient if the reasoning process which led to a result is disclosed with sufficient certainty to enable the litigant to know why it is that the result ensued and to ensure that the statutory right of appeal has been secured.* (Emphasis added.)

[45] Another important point to consider is that in the absence of the JPPH valuation report, what were the recent comparables that the same valuation had done and taken into account in arriving at the market price adopted by the respondent? A proper land valuation is one which has taken into account recent comparables. In *Parkwood Palms Sdn Bhd v Pemungut Duti Setem* [2021]

MLJU 1332; [2021] 1 LNS 1189 Evrol Marriete Peters JC (as Her Ladyship then was) had explained the importance of the method of determining the market value as follows:

> [10] Although 'market value' is not defined in the Stamp Act, it has been judicially explained in a plethora of cases including *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288; [1981] 1 LNS 107, *and Hoe Guan Investment v Collector of Land Revenue, Batu Pahat* [1978] 2 MLJ 115; [1977] 1 LNS 34, in relation to principles of land acquisition. In the former case, it was stated:
>
> > One will notice, however, that there is no definition of what 'market value' means in the Ordinance. One would necessarily have to rely on the principle applicable in land acquisition cases for its meaning.
>
> It is common ground that in determining the market value, nowhere defined in the Ordinance, the courts should be guided by the principles that apply under the Land Acquisition Act — *namely, market value is the price which a willing seller not obliged to sell, might reasonably expect from a willing purchaser with whom he was bargaining for sale and purchase of the land* (*Nanyang Manufacturing Co v CLR Johore* [1954] 1 MLJ 69; [1953] 1 LNS 59) and this amount can best be determined by looking at recent sales of comparable lands in the vicinity.
>
> [11] In accordance with land acquisition principles, reference was made to para 1(1A) of the First Schedule to the Land Acquisition Act 1960 ('Land Acquisition Act'), which reads:
>
> > (1A) *In assessing the market value* of any scheduled land, the valuer may use any suitable method of valuation to arrive at the market value provided that *regard may be had to the prices paid for the recent sales of lands with similar characteristics* as the scheduled land which are situated within the vicinity of the scheduled land and with particular consideration being given *to the last transaction on the scheduled land within two years from the date* with reference to which the scheduled land is to be assessed under subparagraph (1). (Emphasis added.)
>
> [12] *The method of determining 'market value' in the Land Acquisition Act is consistent with the definition of 'market value'* in the *Malaysian Valuation Standards* (6th Ed, 2019), as 'the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arms-length transaction after proper marketing where the parties had acted knowledgeably, prudently and without compensation. (Emphasis added.)

[46] In *Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd* [2021] MLJU 1340; [2021] 9 CLJ 896, Aliza Sulaiman J in analysing the issue of the reserve auction price of the subject land had held as follows:

> [48] In *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd* [1992] 2 MLJ 349; [1992] 3 CLJ 1680; [1992] 1 CLJ Rep 244, the main issue before the Supreme Court was on the interpretation of para. 259(2)(c) of the National Land Code, namely, whether the reserve price for the subsequent auction can be fixed higher than the reserve price of the last unsuccessful auction sale. In the course of the decision, the court at p 249 (CLJ); p 353 (MLJ) alluded to the task entrusted upon

the Senior Assistant Registrar ('SAR') in fixing the reserve price for the purpose of the sale of the land in these words:

> The SAR is not an expert in land valuing, and he has to study the land valuation reports put before him. He may face great difficulty when the estimated market values of the land in the valuation reports put by the plaintiff and by the defendant differ greatly. *In that case he has to scrutinise the reports carefully. If one report contains, as comparison, a schedule of recent sales of lands of similar character and land-use in the vicinity of the land to be sold, and the other report does not, he may choose to accept the first report as the correct guide. But he has to exercise his discretion in fixing the reserve price judiciously which means that he has to hear the parties, and take into consideration all matters which are relevant*.
>
> [49] With the above-mentioned guidance as explicated by the apex court in mind, I shall now proceed to analyse each of the relevant factors in the succeeding paras below.
>
> Analysis
>
> [50] *The Federal Court in Ng Tiou Hong had opined that the safest guide is evidence of sales or similar lands of similar quality or position in the locality of the land which is in issue. This evidence can be seen in ASM's VR and Econpile's VR.* (Emphasis added.)

[47] Therefore, the mere statement by the respondent of the alleged valuation value is insufficient. The applicant must be given the grounds on which the valuation is based. To date, the applicant has yet to know the basis for the respondent's valuation much less any information as to which are the comparables which have been considered.

[48] The principles of natural justice also require the applicant to be given the right to be heard before the decision could be made. The respondent can only determine the market value of an asset disposed of if, amongst others, it 'is of the opinion that the market value of an asset as agreed on by the parties to its disposal is incorrect'. So, how could the respondent have formed such an opinion if he had not even seen, much less considered the correctness of the independent contemporaneous valuation report? In fact, it is obvious from the respondent's letter dated 23 July 2021 that he had not been aware that the applicant had already adopted and applied the market value and had even obtained an independent contemporaneous valuation report for the transaction.

[49] In *Ketua Pengarah Hasil Dalam Negeri v Latex Manufacturing Sdn Bhd* [2017] 7 MLJ 379 the High Court had after reviewing plethora of cases had held that:

> [35] From the plethora of cases, some of which had been highlighted above, it would appear that *the right to be heard within the context of natural justice would mean that any person to be affected by the decision of the statutory tribunal has a right to be heard, to know the case or evidence that might assist his case and be given every*

A *opportunity to state his version for consideration. If these facts are concealed from the person who would be adversely affected by the said decision, making it impossible and/or difficult for that person to defend himself, then there is clear breach of the basic rule of natural justice/procedural fairness.* (Emphasis added.)

B **[50]** It is therefore another question of law whether the respondent's decision had also been made in breach of the applicant's legitimate expectations that it would be given reasons for the decision and/or the prior opportunity to be heard.

C **[51]** Indeed, from the discussion alluded to in the above judicial review will be more appropriate forum as the applicant's complaints raise questions of law and as reminded by the Federal Court in the *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1, 'when genuine grounds for judicial review are alleged, it is the refusal rather than the grant of relief which is the exceptional course'.

D

[52] This court is also persuaded to grant the stay of all further proceedings in respect of the decision in light of the special circumstances arising herein and as discussed in the above. The applicant's status quo has to be preserved as the implementation of the respondent's decision will result in significant tax liabilities which would adversely and unfairly affect the applicant. In preserving the status quo by suspending the decision under challenge pending the determination of the judicial review application will not deny the applicant the full benefit of a successful challenge more so when the challenge against the decision is premised upon error of law and a serious breach of the principles of natural justice.

E

F

[53] The balance of convenience tilt in favour of the applicant and if a stay is not granted the applicant will suffer damage and injury which cannot be remedied by the refund of huge taxes. On the other hand, the respondent cannot be gainsaid to be affected by the stay order because in the event the judicial review application is subsequently disallowed at the substantive stage, the respondent is able to collect the taxes imposed on the applicant.

G

H

[54] In granting leave for the applicant to commence judicial review in this matter, this court is reminded of the instructive passage from the Supreme Court's decision in *Government of Malaysia v Jasanusa Sdn Bhd* [1994] MLJU 370; [1995] 2 CLJ 701 where the court stated:

I

> ... Matters of this nature involve, inter alia, balancing the need of the Government to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments ... The court should also bear In mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to

fulfill the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment.

CONCLUSION

[55] Premised on the above, this court granted order in terms of the application for leave and stay of further proceedings until the final determination of the judicial review application.

Court granted order in terms of application for leave and stay of further proceedings until final determination of judicial review application.

Reported by Dzulqarnain bin Ab Fatar